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No. 04-1204

In the Supreme Court of the United States

UNITED STATES OF AMERICA, EX REL.
DAN GRAVES; SUSAN NEWMAN,
Petitioners,

v.

ITT EDUCATIONAL SERVICES, INC.;
PRICEWATERHOUSECOOPERS LLP,
Respondents.

UNITED STATES OF AMERICA, EX REL.
JAMES F. BOWMAN,
Petitioner,

v.

EDUCATION AMERICA, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR REHEARING

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The petitioners herein respectfully move this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on April 18, 2005, and (2) granting the petition. As grounds for this motion, petitioners state as follows:

1. THE U.S. DEPARTMENT OF EDUCATION ADOPTED A REGULATION THAT DIRECTLY CONFLICTS WITH THE HIGHER EDUCATION ACT

In 2001, the U.S. House of Representatives passed the "Internet Equity and Education Act of 2001," a bill amending the recruiter compensation prohibition in the Higher Education Act. The bill inserted a revenue-based "salary" exemption and other exceptions to the prohibition against paying incentive compensation to recruiters at proprietary schools. H.R. 1992, 107TH CONG., 1ST SESS. § 484C (2001). The amendment permitted third parties and employees to participate in the revenues from an enrollment, limiting the ban to compensation "based *directly* on success" in securing enrollments [eliminating the word "indirectly" from the existing law]. The House bill passed on October 10, 2001. The companion Senate bill – S. 1445, 107TH CONG., 1ST SESS. § 484C (2001) – never came up for a vote. The amendment failed.

The U.S. Department of Education adopted regulations in November 2002 allowing the very exemptions that Congress refused to enact when it considered the Internet Equity and Education Act of 2001. See, 34 C.F.R. § 668.14(B)(22). The Agency explained in the Federal Register that the reason for the so-called "safe harbors" was because the Department of Education considered the incentive compensation statute to be redundant.

> incentive payments are now just one of several remedies in place that prevent schools from unscrupulously recruiting unqualified students.[1]

Under the Higher Education Act, proprietary schools are strictly prohibited from paying recruiters "directly or indirectly" based on the number of students they enroll. The U.S. Department of Education circumvented Congress on the incentive compensation issue. The U.S. Department of Education has effectively legalized the conduct directly prohibited in the Higher Education Act.

2. THE U.S. DEPARTMENT OF EDUCATION ANNOUNCED A POLICY OF NON-ENFORCEMENT OF THE RECRUITER COMPENSATION STATUTE

In a memorandum dated October 30, 2002, the U.S. Department of Education announced a new policy "to view a violation of the incentive compensation prohibition as not resulting in monetary loss to the Department." The U.S. Department of Justice has taken the opposite position, asserting in its amicus brief that ITT's recruiter compensation violations resulted in a financial loss to the government of no less than $400 million on defaulted student loans. The Agency's practice, as reflected in the regulation and policy statement, is that proprietary schools are without liability to repay the defaulted student loans and Pell grants received while their recruiters are being compensated in direct violation of the Higher Education Act.

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[1] 67 FEDERAL REGISTER 67054 (NOV. 1, 2002).

The U.S. Department of Education has unconstitutionally overstepped its authority with this regulation and policy statement. Executive agencies, functioning as the "fourth branch of the Government," may not subvert the statutes under which they operate. The Department of Education acted legislatively, and thus unconstitutionally, by exceeding the parameters of the Higher Education Act, 20 U.S.C. § 1094(a)(20). See, INS v. Chadha, 462 U.S. 919, 967-969 (1983). Congress very directly addressed the precise conduct at issue in 2001, when it considered amending 20 U.S.C. § 1094(a)(20). The U.S. Department of Education is now refusing to fully implement the statute that prohibits the payment of incentive compensation to recruiters at proprietary schools.

The regulation unconstitutionally encroaches on the powers reserved to Congress in the Appropriations Clause. Federal agencies are bound by the terms and conditions of appropriations made by Congress. OPM v. Richmond, 496 U.S. 414 (1990). See also, Skinner v. Mid-Am. Pipeline Co., 490 U.S. 212, 259-60, 109 S.Ct. 1726, 104 L.Ed.2d 250 (1989) (recognizing Congressional restrictions placed on agency spending). Regulations passed by the DeptEdu are subject to the limitations contained in the HEA. See, California Cosmetology Coalition v. Riley, 110 F.3d 1454 (9th Cir. 1997)(holding DeptEdu regulation exceeded agency's authority). The rulemaking authority of federal agencies is confined to the parameters of federal statutes. Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976).[2]

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[2] Ernst & Ernst explains:

> The rulemaking authority granted to an administrative agency charged with administation of a federal statute is

Congress spoke directly to recruiter compensation in 2001. It declined to amend the law. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Under Chevron, id., at 842-843, an unambiguous statute governs.

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. **n9**
>
> **n9** The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. [citations omitted] If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the

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> not the power to make law. Rather, it is "'the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.'" Dixon v. United States, 381 U.S. 68, 74, 14 L.Ed.2d 223, 85 S.Ct. 1301 (1965), quoting Manhattan General Equipment Co. v. Commissioner, 297 U.S. 129, 134, 80 L.Ed. 528, 56 S.Ct. 397 (1936). Thus, despite the broad view of the Rule advanced by the Commission in this case, its scope cannot exceed the power granted the Commission by Congress under § 10(b).

Id., at 213-214.

> precise question at issue, that intention is the law and must be given effect.

Chevron, id., at 842-843.

The Fifth Circuit decision cuts off the remedy of a False Claims Act suit to recover defaulted student loans and Pell grants against companies that violate the recruiter compensation statute, while at the same time the U.S. Department of Education is refusing to enforce the statute. The petition should be granted so that the False Claims Act remedies apply to violations of the eligibility requirements in the Higher Education Act.

CONCLUSION

Tuition at ITT is $35,000. Congress clearly intended to protect the students. For the reasons set forth above, as well as those contained in the petition for writ of certiorari, petitioners pray that this Court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

Respectfully submitted,

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Counsel for Petitioners

May 13, 2005

CERTIFICATE OF COUNSEL

I, Scott D. Levy, certify as follows:

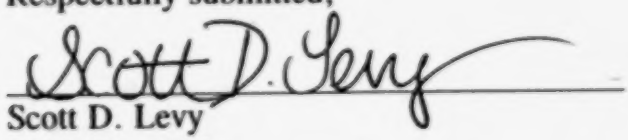
1. I prepared this Petition for Rehearing of Petition for Writ of Certiorari.

2. Pursuant to Rule 44.2 of the Supreme Court Rules, I certify that I have limited this Petition for Rehearing to intervening circumstances of a substantial; or controlling effect or to other substantial grounds not previously presented.

3. This Petition is presented in good faith and not for the purpose of delay.

Dated: May 13, 2005

Respectfully submitted,



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